

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-7018, 77-7034

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 77-7018, 77-7034

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENSON, Ph.D.,

Plaintiffs-Appellees.

—against—

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR.,
ELVIS J. STAHR, JR.,

Defendants.

—and—

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING EN BANC

ROTHWELL, CAPPELLO & BERNDTSON
Attorneys for Plaintiffs-Appellees
1730 K Street, N.W.
Washington, D.C. 20006
(202) 785-5025

Of Counsel:

THOMAS A. ROTHWELL
ARTHUR H. BERNDTSON



PETITION FOR REHEARING EN BANC

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D., and Robert H. White-Stevens, Ph.D., plaintiffs-appellees, submit this Petition to the Court pursuant to Rules 35 and 40, Fed.R.App.Pro. for a rehearing en banc of the decision of a panel of this Court dated May 25, 1977 reversing judgments against The New York Times Company and Roland C. Clement and dismissing appellees' complaint.

On January 7, 1977 a judgment in favor of appellees Edwards, Jukes, and White-Stevens was entered against defendants The New York Times Company and Roland C. Clement in the amount of \$61,003. The action had been tried from June 3 to June 9, 1976 before the Honorable Charles M. Metzner, United States District Court Judge, Southern District of New York and a jury. The decision of the trial court appears at 423 F.Supp. 516. Notices of appeal were filed on January 17, 1977 by The New York Times and on February 3, 1977 for Roland C. Clement. Oral arguments before a panel of this court were heard on May 10, 1977, and the Court filed its opinion of May 25, 1977 reversing in all respects the judgment of the Court below and dismissing plaintiffs' complaint.

It is as to this opinion and judgment of May 25, 1977 that plaintiffs-appellees petition the Court for a rehearing en banc. In support of this Petition plaintiffs-appellees rely on the following matters:

- 1) That the decision and order of this Court of May 25, 1977 is contrary to and inconsistent with prior law as to the scope of immunity under the First Amendment as to the subject matter of defamatory publications as to public figures.

2) That the Court in reaching its decision of May 25, 1977, overlooked, misunderstood and misinterpreted in an unreasonable and inconsistent manner crucial elements of evidence, especially those elements going to the state of mind of defendants.

3) That the controversy is of public importance and interest and presents questions and issues likely to recur frequently, and that the decision and opinion of the panel that considered the case will affect many other cases.

4) That the panel of this Court, in reaching its conclusions, substituted its judgment as to contested issues of fact for that of the jury, thus exceeding the proper limits of appellate jurisdiction.

STATEMENT OF THE CASE

This case once again brings to this Court basic issues of the conflict and tensions as between First Amendment values of the freedom of expression by the media and "the individual's right to be free of unjust damage to his reputation" (Slip Opinion, p. 3759).¹

On August 14, 1972, there appeared in the New York Times newspaper an article headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." This article appeared under the by-line of the Times reporter John Devlin, and was incorporated in plaintiffs' complaint.

The basis of this article was a story appearing as the Foreword to the Audubon publication "American Birds" in an edition

¹References to Slip Opinion herein are to the opinion of May 25, 1977 written by the Chief Judge.

dated April, 1972, but not distributed by Audubon until July, 1972. The "American Birds" Foreword was also incorporated into the complaint.

This Foreword came to the attention of Devlin, a long-time nature reporter for the Times. Devlin followed up on this story that he deemed newsworthy. There ensued at least two phone conversations as between Devlin and Robert S. Arbib, the editor of "American Birds" and the author of the Foreword. The Foreword had also been approved, edited and supplemented by Roland C. Clement, Vice President of Audubon.

The testimony adduced at trial as to the content of these calls was contradictory as between the Devlin and Arbib versions thereof. It was agreed that the reporter Devlin had pressed Arbib for the names of those who were "being paid to lie, or is parroting something he knows little about." Such was the lurid phraseology appearing in the "American Birds" Foreword. The names were not given in the first phone call; but five names were ultimately made available to Devlin by Arbib, who had obtained the names from Clement.

Arbib testified that he had admonished Devlin that "under no circumstances was he to say that we were calling Mr. Jukes a paid liar or Dr. White-Stevens a paid liar or anything like that."

Subsequent to receiving the names from Arbib, Devlin telephoned Jukes, White-Stevens and Spencer. Although on the witness stand Devlin was most vague about the substance of these calls, his notes pertaining thereto have been preserved and were received into evidence. Also, the Times story itself contained references

to these conversations, including Dr. Spencer's characterization of the language in the "American Birds" Foreword as "almost libelous."

Both plaintiffs Jukes and White-Stevens wrote to Devlin under dates of August 7, 1972 and August 8, 1972 respectively, enclosing both scholarly and "popular press" support for their minority views in reference to DDT and the analysis of Audubon Bird Count data. Thus, it was clear that Devlin had contacted three of the five individuals who had been identified to him by Arbib (whether with or without the warning to which Arbib testified). Two of the three contacted warned Devlin about libel potential (Spencer and White-Stevens), and two of the three (Jukes and White-Stevens) forwarded material to Devlin that squarely contravened the "paid to lie" charge in the Foreword.

The Times did not treat the Devlin story as hot, fast-breaking news. Devlin wrote three summaries of his story which were submitted to his editors and the story was published on August 14, 1972.

On that same day, August 14, 1972, defendant-appellant Clement wrote (over Arbib's signature) a letter commending "Jack Devlin's punchy piece." Clement's letter contained the phraseology "Nor do we like to call people liars, but . . ." This letter was also incorporated into the complaint. The following day Clement circulated an internal memorandum which indicated that Arbib had received the names he gave to Devlin from Clement and wrote that they were " . . . people I have never called liars, though they may be."

THE VERDICT AGAINST THE TIMES

The Court concedes that the charge "paid to lie" contained in the Foreword and reprinted by the Times is a libelous assault on appellees. "It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than 'paid liar'. It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees." (Slip Opinion, pg. 3773)

Judge Metzner, in his opinion denying the Times motion for judgment n.o.v., noted that Devlin was "a reporter of 25 years experience who must have known from the outset that he was dealing with a libelous article. The Times has never contended that the story was not libelous." Judge Metzner also wrote that "the jury was fully justified in finding that while Arbib had furnished Devlin with the names, he had also cautioned against their use."

In the light of the above findings, it is most difficult to see how the Court here could reach the conclusion that:

"It is uncontested that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Nor was there a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars.'" (Slip Opinion, p. 3771)

The case was tried under the rule of New York Times v. Sullivan, 376 U.S. 254 (1964), "with reckless disregard whether it was false or not," which is the Supreme Court's definition of actual malice. In New York Times v. Sullivan, the Court also said:

"...The state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement."

This Court departs from this stand when it invokes First Amendment immunity "regardless of the reporter's private views regarding their validity." (Slip Opinion, p. 3769)

The reporter's "private views" played no role in this litigation; there was no effort to elicit such, as the reporter Devlin was not a defendant. It has thus far been uncontested that Devlin acted in the premises solely in his capacity as reporter for appellee The New York Times.

In a subsequent case, the Supreme Court further defined the scope of a public figure plaintiff's burden in reference to the state of mind of the media. St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

"The defendant in a defamation action...cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.... Likewise, reckless disregard may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

In all of the leading cases, a "truthful" report of another's defamation is at the basis of the controversy. The Times story was "truthful" only in the sense that Devlin accurately published the names he had received from Arbib and accurately edited the American Birds Foreword. The Times has briefed and argued the case to this Court as if all that was done was to republish the Audubon Foreword. In fact, as may be seen from the most cursory comparison between the Foreword and the Times article, Devlin converted a generalized and petulant editorial observation into a lurid attack on the reputation of plaintiffs. The story was

published with a headline and two sub-heads added by the Times, and Devlin's awareness of the libel involved is set out in the article itself. Two of the three individuals Devlin contacted admonished him concerning the defamation potential of the story he was contemplating. This evidence was uncontroverted.

Specific material was supplied to Devlin by Dr. Jukes and Dr. White-Stevens. In speaking of this material supplied to Devlin by two of the plaintiffs, this Court wrote:

"None of this material, however, responded directly to the Audubon Society's criticism of the use of Bird Count data by these scholars." (Slip Opinion, pg. 3764)

The Court apparently overlooked the seven-page article entitled "Pesticide Influence on Bird Population" by Philip H. Marvin, a far less technical article as compared to the material Devlin had read in "American Birds". Also, and because of its importance, included in this petition as the last page thereof is a table of bird count data supplied by Dr. Jukes. Both the Marvin article and the table of Christmas Bird Count data were supplied to Devlin well prior to publication and could be understood at the high school level. In addition, the summary of hawk migration showing a tripling of hawk species flying by the famous Hawk Mountain Observatory in Pennsylvania were supplied to Devlin well in advance of his publication.

Thus, it is palpable that the material supplied to Devlin prior to the publication of his article was not limited to the general merits of the pesticide controversy, but rather was specific and pointed.

For the purposes of the DDT controversy, it often suited Audubon's purposes to deprecate the significance of its own Bird Count data. However, the jury was also presented with the opinion of Roger Tory Peterson. Mr. Peterson was the Audubon Medalist in 1971, and was described by the President of Audubon as a "gifted artist, author, lecturer, interpreter of birds to the world, and a clear, strong voice for Conservation."

In 1973, an article by Peterson was published by Audubon concerning the significance of the Audubon Christmas Bird Count.

Audubon Medalist Peterson wrote:

"Analyzed intelligently, these counts, as well as the seasonal reports of field observations in various parts of the country that have been published since 1918 under the title of 'The Season,' tell us much about the population trends of birds. From the conservationist's point of view, shifts in bird populations are excellent indicators of the environment -- a sort of 'ecological litmus paper.'"

Devlin's activity in upgrading the original information to the status of a startling defamation; his insistence in obtaining the names from Arbib on the pretext that "the attack seemed to reflect on the entire chemical or pesticide industry as a whole and that a lot of eminent persons might have been hurt if we did not have the names..." provided ample basis for the trier of the fact to appraise Devlin's state of mind. This plus Devlin's bland ignoring of the countervailing proof made available in non-technical terms, and the repeated warnings of libel and defamation, casts Devlin in the role of agent provocateur.

The record here simply belies the Court's view that "The Times article, in short, was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps." (Slip

Opinion, p. 3770)

Devlin's course contrasts sharply with the course of conduct recently reviewed by this Court in Hotchner v. Castillo-Puche, Slip Opinion 2521 (2d Cir. 1977). In Hotchner the publisher made a conscious effort to tone down the more lurid aspects of the defamatory material. In the case at bar, the reporter went to extreme lengths in his successful efforts to create a titillating scandal. The Hotchner case, plus the instant case, has this Court ruling, in effect, that it is immaterial whether a publisher exaggerates or minimizes. In either case the First Amendment immunizes the defamation. Here there was no accurate, neutral, impartial reporting, but rather creative journalism at plaintiffs' expense.

THE VERDICT AGAINST CLEMENT

As to appellant Clement, the Court seems to overlook the fact that Clement collaborated with Arbib in reference to the Foreword. The undisputed testimony is to the effect that Arbib approached Clement with copy for the Foreword concluding with the language "you are in the presence of someone who is being paid to lie." Clement added the last eight words, "or is parroting something he knows nothing about."

It is also undisputed that Clement furnished the names of the five people to Arbib for transmittal to Devlin. Thus, the Clement letter to the Times must be viewed in the context of the facts that Clement knew what was in the Foreword, and he had read the Devlin article. His obvious confirmation and approval was properly ruled by Judge Metzner to constitute a separate libel. The

letter could be found by the jury as a specific endorsement of the epithetical aspects of the Devlin article.

Arbib testified that he had learned about the Christmas Bird Count controversy in the first instance from Clement. In short, Clement was the source of the libel ab initio.

The Court cites an internal memorandum written the day after the publication of the Times article in which Clement attempts to exculpate himself as to his superiors. It is noteworthy that even in this memorandum Clement offers a suggestion that "Arbib was trapped into listing people I have never called liars, though they may be." In these few words, Clement attempts to shift the blame -- if there were to be any -- to Arbib, and also suggests that plaintiffs were, after all, liars. (Slip Opinion, p. 3767)

The distinction offered by the Court between the epithets "liar" and "paid liar" is disconcerting. Plaintiffs have cited *Nichols v. Item Publishing Co.*, 309 N.Y. 596, 132 N.E.2d 860 (1956), as the authoritative statement of New York law relating to the epithet liar. After more than four years of litigation, this is the first time that any such distinction as between "liar" and "paid liar" has appeared as an issue.

Similarly, disconcerting is the Court's reinterpretation of the evidence in the explanation, "Nonetheless, Clement apparently decided that the unfortunate situation could best be turned to advantage..." (Slip Opinion, pg. 3767) Such interpretation is for the trier of the fact in the first instance and the interpretation offered by the Court is especially inapposite when one considers Clement's own testimony in explanation of his letter:

"A Yes, the last paragraph does that. It says, 'nor do we like to call people liars.' I did not want to call Mr. Devlin a liar. I gave a rather ambiguous or soft rendering, a denial that we call people liars.

"Q You understand the words 'nor do we like to call people liars' to mean 'we are not calling people liars'?

"A Yes, sir. That is a soft rendering of a difficult statement. Otherwise, I would have to say Mr. Devlin lied in misusing our data, and I could not say that."

In the light of the above testimony presented to the jury by Clement, it is palpable that Clement himself offered a less plausible explanation for his behavior, and one that differs markedly from the explanation in mitigation offered by the Court sua sponte.

It is also difficult to understand the Court's deprecating of the testimony of Yannacone to the effect that Clement had participated in meetings where the subject of smearing Dr. Jukes and Dr. White-Stevens in the press was discussed. (Slip Opinion, pg. 3772) Once again, it was for the jury to determine issues of credibility as between Yannacone and Dr. Wurster. Surely, it is relevant to Clement's motivation and character. In short, Yannacone's testimony, although sharply limited by the Court's evidentiary rulings, is most telling as to the role of Clement in defaming plaintiffs.

Malice as to Clement was set out in the final paragraph of Judge Metzner's opinion:

"Finally, the jury observed Clement on the witness stand, his demeanor and attitude added to the background of the facts which the jury was justified in finding from the evidence. For example he further denied that anyone was being called a liar in the Foreword. The evidence amply supports the verdict of the jury of actual malice as defined in the Sullivan case, supra."

Malice, in the sense of personal vindictive spite, was amply demonstrated by Clement from the witness stand, and was evident to everyone in the courtroom.

This Court in its opinion, in effect, "has had it both ways." The Court first employs the jury verdict against Clement to exculpate the New York Times. (Slip Opinion, p. 3769) It reaches this conclusion by finding "implicit" in the jury verdict against Clement a "finding of fact," and concludes from this the presence of constitutionally protected, accurate reporting by the Times. Then, having employed the jury's verdict against Clement to exonerate the Times, the Court proceeds to exonerate Clement; and in doing so engages in a reinterpretation of the evidence.

It is respectfully submitted that the better view was stated by Judge Metzner.

"The jury was fully justified in finding that while Arbib had furnished Devlin with the names he had also cautioned against their use. This does not necessarily include a finding that Arbib had stated to Devlin that he was not calling the five persons liars."

In so ruling, Judge Metzner was employing the conventional judicial practice of reading consistency into the verdicts of a jury. By contrast, it is respectfully submitted that this Court has strained to make the verdicts inconsistent and inapposite.

At the beginning of the argument before the Chief Judge, Justice Clark and Judge Jameson, the Chief Judge inquired as to why the jury had let Arbib off. The proper response to this question is that the jury found that Arbib was nothing but a tool and agent for Clement, acting as his conduit to the Times.

During the course of the jury's deliberations they returned

to the courtroom and requested excerpts from the Devlin testimony be read by the reporter. Apparently, the jury had difficulty in fixing liability as to two prestigious ikons of respectability, the Times and National Audubon Society. Thus, the jury returned its verdict against Clement as being the source and operative force of the vilification.

For the Times to be cleared as to the publication of such charges as accusing Nobel Laureate Norman Borlaug of being a paid liar under the circumstances of this case is at least startling. The wildness of the charge might make it newsworthy, but should also make it suspect. The reporter added the names; indeed, without the names as victims, there would have been no story.

Although Devlin may have been under no duty to investigate, once he did investigate, he should be bound by the results thereof. The Christmas Bird Count Data table alone, which was forwarded to Devlin, are computed on a "per observer" basis, and Clement declined an invitation on the witness stand to critique or rebut this most telling evidence that plaintiffs were not liars.

CONCLUSION

The effect of the Court's ruling in this "important case" (Slip Opinion, p. 3759) may well be to muzzle dissent, the expression of sincere but unpopular views by those who have but limited access to the media. Freedom of the press values should not shelter such an unprovoked ad hominum assault as the facts of the

record disclose. Despite the Court's sympathy for the plight of plaintiffs (Slip Opinion, p. 3774, 3775), the Court by its action does in operation condone that which the Court itself finds most reprehensible.

For the above reasons, it is submitted that this Court should withdraw the Opinion and Order of May 25, 1977, and Rehear this cause en banc.

Dated: Washington, D.C.
June 7, 1977

Respectfully submitted,

ROTHWELL, CAPPELLO & BERNDTSON
Attorneys for Plaintiffs-Appellees
1730 K Street, N.W., Suite 1302
Washington, D.C. 20006

Of Counsel:

Thomas A. Rothwell
Arthur H. Berndtson

Table I
Audubon Society Christmas Bird Count Data^a
1941 (2,331 observers) vs. 1960 (8,928 observers)

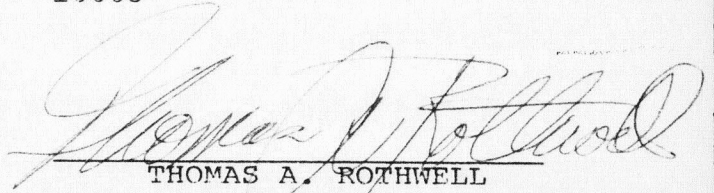
Species	Count		Count/Observer		Ratio per Observer 1960/1941
	1941	1960	1941	1960	
Eagle	197	891	0.08	0.10	1.25
Gull	124,470	635,642	53.40	7.20	1.33
Raven	667	2,699	0.29	0.30	1.03
Crow	185,519	250,307	79.59	28.04	0.35
Quail	2,060	10,276	0.88	1.15	1.31
Pheasant	6,839	19,731	2.93	2.21	0.75
Mourning dove	7,411	72,958	3.18	8.17	2.57
Swallow	14,347	242,303	6.15	27.14	4.41
Grebe	2,501	27,826	1.07	3.12	2.92
Pelican	4,450	10,562	1.91	1.18	0.62
Cormorant	3,246	27,162	1.39	3.04	2.19
Heron	2,254	16,253	0.97	1.82	1.88
Egret	1,469	16,800	0.63	1.88	2.98
Swan	18,554	33,994	7.96	3.81	0.48
Goose	182,820	696,777	78.43	78.04	0.99
Duck	2,137,093	2,739,517	916.81	306.85	0.33
Blackbird	137,502	20,552,375	58.99	2,302.01	39.02
Grackle	24,937	12,570,458	10.70	1,407.98	131.59
Cowbird	40,019	3,286,314	17.17	368.09	21.44
Chickadee	21,330	55,906	9.15	6.26	0.68
Titmouse	5,038	18,268	2.16	2.05	0.95
Nuthatch	4,214	13,439	1.81	1.51	0.83
Robin	19,616	928,639	8.41	104.01	12.37
English sparrow	53,335	358,796	22.88	40.19	1.76
Bluebird	3,742	6,903	1.60	0.77	0.48
Starling	211,836	8,673,095	90.88	971.45	10.69

^a 42nd Christmas Bird Count, *Audubon Magazine*, 1942; 61st Christmas Bird Count, *Audubon Field Notes* 15: 1961.

Certificate of Service

I hereby certify that on this 8th day of June, 1977, two copies of the foregoing Petition for Rehearing en Banc were mailed, first class postage prepaid, to each of the following:

1. Gifford, Woody, Carter & Hays
14 Wall Street
New York, New York 10005
2. Crowe, McCoy, Agoglia, Fogarty & Zweibel, P.C.
80 East Old Country Road
Mineola, New York 11501
3. Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005



THOMAS A. ROTHWELL

ROTHWELL, CAPPELLO & BERNDTSON
1730 K Street, N. W., Suite 1302
Washington, D. C. 20006
(202) 785-5025

Attorneys for Plaintiffs